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In the Supreme Court of the United States

OCTOBER TERM, 1958

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUPPORTING MOOTNESS

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 202

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

On February 25, 1959, the United States District Court for the Southern District of California issued a writ of habeas corpus ad testificandum directed to the Warden of the Federal Detention Headquarters, New York, New York, and the United States Marshal there, commanding that the petitioner, a prisoner at the Federal Detention Headquarters, be produced before a special grand jury in the Southern District of California on March 24, 1959, to testify in a matter under investigation (Vol. 1, Doc. 1 and 2).

On March 23, 1959, while the petitioner was in California, his attorney filed a motion to quash the writ on the ground, *inter alia*, that it was issued in excess of the court's jurisdiction (Vol. I, Doc. 3). The motion was denied, and the petitioner was ordered to appear before the grand jury on April 9, 1959 (Vol. I, Doc. 6). An appeal was noted, and after hearing argument on both sides, the District Court ordered a stay of its prior order directing the petitioner's attendance before the grand jury (Vol. I, Doc. 7 and 9). The Court of Appeals, on motion of the government, dismissed the appeal as frivolous (Vol. II, 26, 27).

The writ of habeas corpus ad testificandum was, however, subsequently discharged, and the petitioner was returned to the Federal Detention Headquarters in New York. He was released on July 10, 1959, following service of his term of imprisonment there (see No. 201, this Term). In view of that fact there is no longer any controversy as to which an order of the Court can be directed in this proceeding. Accordingly, the judgments below should be vacated and the cause remanded with directions to dismiss. See *United States* v. *Munsingwear*, 340 U.S. 36, 39-40; *Mills* v. *Green*, 159 U.S. 651, 653; *Jones* v. *Montague*, 194 U.S. 147, 152-153; *Ex Parte Baez*, 177 U.S. 378, 389-390; *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218; *St. Pierre* v. *United States*, 319 U.S. 41.

In any event, the District Court for the Southern District of California had authority to issue a writ of habeas corpus ad testificandum, directing a custodian outside the territorial jurisdiction of the court to produce the prisoner before the court for testimonial

purposes. *United States* v. *Hayman*, 342 U.S. 205, 221; *Price* v. *Johnston*, 334 U.S. 266, 281-283. Petitioner's reliance on *Ahrens* v. *Clark*, 335 U.S. 188 (where this Court held that a district court lacked jurisdiction to issue a writ of habeas corpus ad subjiciendum outside its territorial jurisdiction) is misplaced. There is a well recognized distinction between a writ of habeas corpus ad testificandum and the writ of habeas corpus ad subjiciendum. *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A.D.C.); *In re Thaw*, 166 Fed. 71, 74 (C.A. 3); *Cuckovich* v. *United States*, 170 F. 2d 89, 90 (C.A. 6), certiorari denied, 336 U.S. 905; Black's Law Dictionary, 4th Ed., 837-838; 3 Blackstone's *Commentaries*, 129-130. See *United States* v. *Hayman*, 342 U.S. 205, fn. 35 at 221.

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